SEET SOON HUA & ANOR

v.

SING PIN DEVELOPMENT SDN BHD & ORS

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL SUIT NO: 22-235-95]
30 OCTOBER 1996

CIVIL PROCEDURE: *Pleadings - Striking out statement of claim - Application made under Rules of the High Court 1980, O. 18 r. 19(1) - Argument of counsel based solely on r. 19(1)(a) - Whether affidavit evidence admissible - Rules of the High Court 1980, O. 18 r. 19(2) - Whether plain and obvious case - Meaning of reasonable cause of action*

The present case was an application by the 6th defendant to strike out the statement of claim pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 ('the RHC') on the basis that it was a *bona fide* purchaser of a piece of land in Butterworth ('the said land'). The application was supported by the affidavits of the managing director of the 6th defendant. Counsel for the 6th defendant concentrated solely on O. 19 r. 19(1)(a) of the RHC and did not argue the striking out under the grounds as set out in r. 19(1)(b) to (d).

The plaintiffs and the 2nd defendant were shareholders and directors of the 1st defendant company. The 3rd and 4th defendants were directors of the 1st defendant company. The 1st defendant was the registered proprietor of the said land. In 1987 the 1st defendant charged the said land to Sabah Development Bank Bhd ('the said bank') as security for a loan facility. The plaintiffs and the 2nd defendants subsequently transferred their shares in the 1st defendant ('the said shares') to the said bank as additional security for the loan facility. It was agreed that the said shares would be retransferred to the plaintiffs and the 2nd defendant upon the discharge of the said land.

In March 1991 the plaintiffs, at the request of the 2nd, 3rd and 4th defendants, entered into an agreement to sell the plaintiffs' shares in the 1st defendant to the 5th defendant ('the sale of shares agreement'). The 2nd defendant had purportedly acted and or held himself as the agent of the 5th defendant in respect of this transaction. The 5th defendant paid part of the purchase price to the plaintiffs but subsequently failed to pay the remaining purchase price and the agreed interest.

In June 1991 the said bank notified their solicitors ('the said solicitors') that the said land would be discharged and the said shares would be returned upon the payment of the redemption sum of a specified amount. The said bank subsequently forwarded to the said solicitors the original title deed and the discharge of charge in respect of the said land and the share certificates and the duly executed share transfer forms in respect of the said shares.

In July 1991, the 2nd, 3rd and 4th defendants as directors of the 1st defendant company passed a resolution approving the sale of the said land to the 6th defendant ('the said resolution'). The sale and purchase agreement and the memorandum of transfer in respect of the said land were duly executed by the 2nd and 3rd defendants and in October 1991, the memorandum of transfer was duly registered in favour of the 6th defendant. The said land was charged by the 6th defendant to Overseas Union Bank Ltd as security for a loan.

The plaintiffs claimed that they had written to the said solicitors for the share certificates and share transfer forms in respect of their shares but to date they had not received the same. The plaintiffs further claimed that between the months of March and July 1991, the 2nd, 3rd, 4th and 5th defendant had fraudulently conspired amongst themselves to defraud the plaintiffs in the sale of the plaintiffs' shares to the 5th defendant and to deceive the plaintiffs in the disposal of the said land to the 6th defendant. The plaintiffs claimed that the sale of shares was a sham transaction perpetrated on the plaintiffs by the defendants to facilitate the sale of the said land to the 6th defendant and that the whole transaction was void and of no effect.

Held:

[1] For an application under O. 18 r. 19(1)(a) of the RHC, no affidavit evidence shall be admissible as the court shall consider only the pleadings for the purpose of determining whether the statement of claim discloses no reasonable cause of action or the defence discloses no defence. But for applications under any of the other grounds or where the inherent jurisdiction of the court is invoked, affidavit evidence may be and ordinarily is used.

[2] A reasonable cause of action means a cause of action with some chance of success when (as required by O. 18 r. 19 (2)) only the allegations in the pleadings are considered. It is not the function of the court, in an application under O. 18 r. 19(1)(a), to try the issues but to decide simply whether there is a triable issue. A reasonable cause of action will be satisfied if a substantial issue has been raised for the court's determination and the plaintiff has some genuine interest in the remedy sought. The mere fact that the case is weak and unlikely to succeed is no ground for striking out the statement of claim.

[3] A court will only exercise its powers to strike out pleadings or part of a pleading under any of the four grounds in O. 18 r. 19(1) of the RHC in plain and obvious cases. This summary process of striking out can only be adopted when it can be clearly seen that a claim or a defence is on the face of it obviously unsustainable. That power to strike out cannot be exercised by a minute examination of the documents and the facts of the case in order to see whether a party has a cause of action or defence.

[4] The plaintiff had raised serious issues, and it was not clear nor obvious that the plaintiff's action against the 6th defendant had no chance of success. The disputed issues, *inter alia*, whether the 6th defendant was or was not a *bona fide* purchaser could not be tried at this stage; it must await the trial.

[Application dismissed with costs.]

Cases referred to:
Aik Ming (M) Sdn Bhd v. Chang Ching Chuen [1995] 2 MLJ 770 ***(cit)***
Bandar Builder Sdn Bhd & Ors v. UMBC [1993] 3 MLJ 36 ***(refd)***
Drummond-Jackson v. British Medical Association & Ors [1970] 1 WLR 688 ***(refd)***
Henry Wong Jan Fook v. John Lee & Anor [1976] 1 MLJ 231 ***(cit)***
New Straits Times (M) v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 ***(refd)***
Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor [1994] 1 MLJ 156 ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113 ***(refd)***
Penang Development Corpn v. Khaw Chin Boo & Anor [1993] 2 MLJ 161 ***(cit)***
Saw Seng Kee v. Nadzri & Ng Securities Sdn Bhd [1996] 2 AMR 1578 ***(refd)***
Sea Breeze Navigation Co SA v. 'Hsing An' Owners [1974] 1 MLJ 45 ***(refd)***
Tun Datuk Hj Mustapha Datuk Harun v. State Legislative Assembly of Sabah [1993] 1 MLJ 26 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 67(1), 132C
National Land Code 1965, s. 214
Rules of the High Court 1980, O. 18 r. 19(1), (2)

Other sources referred to:
English Supreme Court Practice 1995, para 18/19/11
Mallal's Supreme Court Practice, 2nd edn, para 18/19/2

For the plaintiffs - Daphne Choy; M/s Shearn Delamore & Co
For the 2nd & 3rd defendants - Lee Khai; M/s Ong & Manecksha
For the 6th defendant - Abu Bakar As-Sidek; M/s Ghazi & Lim

Reported by Ling Hea Hoon

JUDGMENT

Jeffrey Tan J:

This is the 6th defendant's application (encl. 10), pursuant to O. 18 r. 19(1)(a - d) of the Rules of the High Court 1980, so Mr. Abu Bakar As-Sidek for the 6th defendant informed when he argued the application, to strike out paras. 8, 26 & 27 of the statement of claim. The application is supported by encls. 5, 8, & 9, the affidavits of Tan Kee Chin, the managing director of the 6th defendant.

On the subject of evidence, in an application under O. 18 r. 19(1)(a), no affidavit evidence "shall be admissible" (see r. 19(2)) as the court considers only the pleadings for the purpose of determining whether the statement of claim discloses no reasonable cause of action or the defence discloses no defence (see *New Straits Times (Malaysia) v. Kumpulan Kertas Niaga Sdn. Bhd. & Anor* [1985] 1 MLJ 226). "But in application on any of the other grounds ... or where the inherent jurisdiction of the court is invoked, affidavit evidence may be and ordinarily is used" (The English Supreme Court Practice 1995 Vol 1 para 18/19/6).

In *Saw Seng Kee v. Nadzri and Ng Securities Sdn. Bhd.* [1996] 2 AMR 1578, an appeal against the order of the High Court striking out the appellants' action on the grounds mentioned in r. 19(1)(a)(b) & (d), the Court of Appeal held that affidavit evidence was admissible (see p. 1585 line 8 of the report); the Court of Appeal evaluated then the contested facts, culled from the affidavits filed, for the purpose of determining whether the statement of claim disclosed a reasonable cause of action. However, and with respect, that evaluation should not have been pursued, as there were no facts or disputed facts (since it was inadmissible) to be evaluated; under ground 19(1)(a), there were only the pleadings to be considered. To settle the issue, it is only necessary to cite the dictum of the Federal Court, per Gopal Sri Ram JCA, in *Owen Sim Liang Khui v. Piasau Jaya Sdn. Bhd. & Anor* [1996] 1 MLJ 113 at 122:

> Sub-rule 2 of O. 18 r. 19 prohibits the use of affidavit evidence and confines the court to four corners of a pleading only in applications made under para. (a). It is settled beyond doubt that affidavit evidence is always admissible under an application made under other paragraphs of the first sub-rule or under the inherent jurisdiction of the court. See *Tractors Malaysia v. Tio Chee Hing* [1975] 2 MLJ 1; *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd.* [1993] 3 MLJ 16.

What is the state of the pleadings in the instant case? The statement of claim may be paraphrased as follows. At all material times, (i) the plaintiffs were shareholders and directors of the 1st defendant, a private limited company, (ii) the 2nd defendant was a shareholder and director of the 1st defendant company, (iii) the 3rd and 4th defendants were directors of the 1st defendant company, and (iv) the 6th defendant was a private limited company. The 1st defendant company had an authorised capital of RM1,000,000 divided into 1,000,000 ordinary shares of RM1 each; 600,000 shares were issued; 212,682 shares to the 1st plaintiff, 286,726 shares to the 2nd plaintiff and 180,646 shares to the 2nd defendant. The 1st defendant was the registered proprietor of land known as Lot 468 Section 4 Town of Butterworth held under Grant (1st Grade) 13127 (the said land). On or about 25 September 1987, the 1st defendant charged the said land to the Sabah Development Bank Bhd. as security for a loan facility. Sometime in 1989, the plaintiffs and the 2nd defendant transferred their 600,000 shares to the Sabah Development Bank (Nominees) Sdn. Bhd. as an additional security for the loan facility. The 600,000 shares would be retransferred to the plaintiffs and 2nd defendant upon the discharge of the said land. Sometime in March 1991, at the request of the 2nd, 3rd and 4th defendants, the plaintiffs agreed to sell their 419,354 shares to the 5th defendant. The agreement of sale, dated 15 March 1991, provided for the payment of a deposit of RM100,000 and for the payment of the balance sum of RM2,200,000 on or before 15 September 1991; interest was payable in the event of any delay in the payment of the balance sum. At all material times, with regard to the sale of the said shares, the 2nd defendant acted and or held himself as the agent of the 5th defendant. On or about 22 October 1991, the 2nd defendant forwarded the 1st defendant's cheque for the sum of RM1,000,000 to the plaintiffs, purportedly being the payment received from the 5th defendant towards the balance purchase price; on behalf of the 5th defendant, the 2nd defendant also requested for time to pay the remaining balance sum and the agreed interest. Despite repeated requests, the 2nd and or 5th defendants failed and or neglected to pay the remaining purchase price and the agreed interest. Sometime in April 1995, the 2nd defendant admitted to the 1st plaintiff's father that he had no interest, "personal or otherwise", in the agreement of 15 March 1991. The 5th defendant disclaimed any role in the payment of the RM1,000,000 and advised the 1st plaintiff's father to seek clarification from the 2nd defendant. Despite several attempts, the 1st plaintiff's father failed to reach the 2nd defendant. Upon enquiries, the plaintiffs uncovered the following:

(a) on or about 7 June 1991, the said Sabah Development Bank notified Messrs Chong and Leonard, Advocates & Solicitors, that the said land would be discharged and that the 600,000 shares would be returned upon the payment of a redemption sum of RM600,000,

(b) on or about 25 June 1991, the said Sabah Development Bank forwarded to Messrs Chong and Leonard the original title deed, the discharge of charge, the share certificates and duly executed share transfer forms.

(c) on or about 10 July 1991, the 2nd, 3rd and 4th defendants passed a resolution, purportedly pursuant to art. 70 of the Memorandum and Articles of Association of the 1st defendant company, approving the sale of the said land to the 6th defendant,

(d) on or about 10 July 1991, the 2nd and 3rd defendants purportedly executed the agreement with regard to the 1st defendant's sale of the said land to the 6th defendant,

(e) on or about 15 July 1991, the 2nd and 3rd defendants purportedly executed a Memorandum of Transfer of the said land in favour of the 6th defendant,

(f) on or about 7 October 1991, the said Memorandum of Transfer was registered in favour of the 6th defendant,

(g) on or about 12 October 1991, the 6th defendant charged the said land to the Overseas Union Bank Ltd., as security for a loan of RM2,000,000,

The statement of claim continues as follows. The plaintiffs instructed their solicitors to write to Messrs Chong and Leonard for the said share certificates and share transfer forms. To date, the plaintiffs have not received the same. The 2nd, 3rd 4th and 5th defendants, between the months of March and July 1991, "wrongfully, unlawfully, fraudulently, conspired and combined amongst themselves to defraud and to injure the plaintiffs in the sale of the said shares and to deceive the plaintiffs in the disposal of the said land." In the furtherance of that conspiracy, the 2nd, 3rd 4th and 5th defendants caused the following acts: arranging, causing or effecting (i) the sale of the plaintiffs' shares in conjunction of the sale of the said land, (ii) the sale of the plaintiffs' shares under a share agreement to facilitate the sale of the said land, (iii) the sale of the plaintiffs' shares in violation of s. 67(1) of the Companies Act 1965, (iv) the sale of the plaintiffs' shares when the 5th defendant had no intention or means to purchase the said shares, (v) the sale of the said land without the approval of the plaintiffs as legal and or beneficial shareholders of the 1st defendant company, (vi) the sale of the said land without the approval of the Sabah Development Bank (Nominees) Sdn. Bhd., the agents of the

plaintiffs, (vii) the sale of the said land in violation of s. 132C of the Companies Act 1965 and s. 214 of the National Land Code, (viii) the sale of the said land without any proper valuation in disregard and to the detriment of the plaintiffs and 1st defendant's interest, and, (ix) the disposal of the sale proceeds, the sum of RM4,980,000 or a substantial part thereof, to party or parties not entitled thereto.

Paragraphs 26 and 27 of the statement of claim that follow read:

26. Selanjutnya atau dalam alternatif Plaintif menegaskan bahawa Defendant Keenam adalah pada semua masa material bukan seorang pembeli *bona fide* untuk nilai tanah tersebut.

Butir-Butir

(i) Defendan keenam tahu atau patut tahu bahawa tanah tersebut adalah aset tunggal Defendan pertama;

(ii) Defendan keenam tahu atau patut tahu bahawa jualan tanah tersebut telah dibuat oleh Defendan pertama tanpa lulusan pemegang-pemegang sahamnya.

(iii) Defendan keenam tahu atau patut tahu bahawa tanah tersebut telah digadai kepada Sabah Development (Nominees) Sdn. Bhd. dan juga kepentingan Plaintif pertama dan kedua sebagai pemegang-pemegang saham sah di sisi undang-undang atau benefisial Defendan pertama.

(iv) Defendan keenam tahu atau patut tahu bahawa jualan tanah tersebut adalah tanpa lulusan Plaintif pertama dan kedua sebagai pemegang-pemegang saham sah di sisi undang-undang atau benefisial Defendan pertama;

(v) Defendan keenam tahu atau patut tahu bahawa jualan tanah tersebut adalah tanpa lulusan Sabah Development (Nominees) Sdn. Bhd. sebagai agen Plaintif pertama dan kedua, merupakan pemegang-pemegang saham sah di sisi undang-undang atau benefisial Defendan pertama;

(vi) Defendan keenam tahu atau patut tahu bahawa Defendan pertama tidak ada kapasiti dan Defendan-Defendan kedua, ketiga dan keempat tidak ada kuasa untuk melesapkan tanah tersebut atas pihak Defendan pertama samada di bawah Perkara 70 dalam Memorandum dan Perkara-perkara Persatuan atau sebaliknya.

(vii) Defendan keenam tahu atau patut tahu bahawa jualan tanah tersebut telah dibuat tanpa sebarang atau sebarang penilaian yang wajar mengabaikan dan/atau menjejaskan kepentingan Plaintif dan/atau Defendan pertama.

27. Plaintif menegaskan dengan lebih lanjutnya bahawa pendaftaran Memorandum Pindah-milik bertarikh 7hb Oktober 1991 berkenaan tanah tersebut adalah melanggar peruntukan Kanun Tanah Negara 1965 dan Akta Syarikat 1965 dan dalam keadaan itu adalah batal dan tidak sah.

Lastly, the statement of claim asserts that the agreement of 15 March 1991 was a sham transaction, perpetrated without the consent and or knowledge of the plaintiffs to facilitate the sale of the said land to the 6th defendant, and is void and of no effect; it seeks the following relief:

(i) declarations that the agreement of 15 March 1991, the resolution of 10 July 1991, the sale and purchase agreement of 10 July 1991, the Memorandum of Transfer in favour of the 6th defendant, are all null and void,

(ii) an order that the 6th defendant do pay the redemption sum to the Overseas Union Bank Ltd to obtain a discharge of the said land,

(iii) an order that the Registrar of Titles, upon the discharge of the charge in favour of the Overseas Union Bank Ltd., do expunge the transfer in favour of the 6th defendant,

(iv) an order that the document of title, upon the cancellation of the transfer dated 15 July 1971, be returned forthwith to the 1st defendant and or to the plaintiffs,

(v) an inquiry on the disbursement of the said RM4,980,000 and an order that all persons who received any of those monies do repay those monies to the person or persons entitled thereto.

(vi) an order that the shares of the plaintiffs be returned to the plaintiffs.

The 2nd, 5th and 6th defendants filed separate defences.

The defence of the 2nd defendant reads as follows. The father of the 1st plaintiff conducted all negotiations on the sale of the said shares. The plaintiffs agreed to sell all their shares. On or about June 1991, in consideration of the sum of RM150,000 the 5th defendant assigned his interest in the agreement of 15 March 1991 to the 3rd and 4th defendants. Part of the purchase price was paid to a 3rd party to discharge the debt due from the family of the plaintiff to the 3rd party. A further sum of RM192,000 at the request of the plaintiffs, was paid to Seet Yin Foong, a sister of the 1st plaintiff. The plaintiffs offered the sale of their shares and those shares were sold. He was not the agent of the 5th defendant. The 5th defendant forwarded a cash cheque for RM100,000, as the deposit and part payment towards the purchase price,

to him. He handed that cheque to the father of the 1st plaintiff who had the plaintiffs' authority to act on behalf of both plaintiffs in the sale of the said shares. He had no knowledge, (i) of the meeting between the 5th defendant and the father of the 1st plaintiff, (ii) of the payment of RM1,000,000 (iii) that the 5th defendant had denied his interest in the said agreement of 15 March 1991, or (iv) that the 5th defendant had advised the father of the 1st plaintiff to seek the clarification of the 2nd defendant. The 5th defendant signed the agreement of 15 March 1991; he cannot deny the said agreement. The father of the 1st plaintiff had not attempted to see him. The plaintiffs voluntarily divested themselves of their shares; they were paid in full and they are estopped from rescinding the said sale. He had not, either solely or in concert with the other defendants, defrauded or injured the plaintiffs. The 6th defendant has an indefeasible title to the said land. The 6th defendant was a *bona fide* purchaser. The plaintiffs' remedy is founded in damages but not in the rescission of the said sale of the said land.

The defence of the 5th defendant reads as follows. He signed an agreement but he cannot remember the terms. The 2nd defendant was not his agent and he is not responsible for the 2nd defendant's acts. He has no interest in the 1st defendant company. He has no knowledge of the dealings between the plaintiffs and the 2nd, 3rd and 4th defendants. He has no knowledge of the allegations in paras 21 to 23 of the statement of claim. He did not wrongfully, unlawfully and fraudulently conspired and combined with the other defendants to defraud and to injure the plaintiffs. He has no knowledge that the 6th defendant was not a *bona fide* purchaser or of para. 27 of the statement of claim. He signed the agreement but he had no knowledge of the events after he signed the agreement. The plaintiffs have no cause of action against him.

The defence of the 6th defendant reads as follows. They have no knowledge of the matters pleaded by the plaintiffs to have transpired between the other defendants and the plaintiffs. The plaintiffs' particulars of fraud against them are bare allegations. They were a *bona fide* purchaser and there are no facts supporting the plaintiffs' particulars of fraud against them. The plaintiffs had not disclosed a reasonable cause of action against them. Sometime in 1991, they met the 1st defendant's representatives. They discussed the purchase of the said land with the 2nd and 3rd defendants. On 10 July 1991, the 2nd and 4th defendants approved a Directors' Resolution for the sale of the said land to them. On 10 July 1991, the 1st and 2nd defendants entered into a sale and purchase agreement for the sale of the said land at a price of RM4,980,000. They entered a caveat. On 15 July 1991, the 2nd and 3rd defendants executed on behalf of the 1st defendant a transfer of the said land unto them. That transfer was registered on 6 December 1992. They charged the said land to

the Overseas Union Bank Ltd to obtain a loan of RM2,000,000. On 12 January 1992, they paid the full purchase price through their solicitors to the 1st defendant. They did not and could not have known that the said land was the only asset of the 1st defendant; the directors of the 1st defendant had not brought that fact to their knowledge. They acted merely on the resolution of 10 July 1991. They were not required to investigate into the internal affairs of the 1st defendant. Whether the sale by the 1st defendant had or had not the approval of the shareholders/agents was not important/material as they dealt at all times with the directors of the 1st defendant who had authority to bind the 1st defendant. It was not their duty to ensure there was a valuation report or that the said land was sold at a profitable price. They transacted on a "willing buyer, willing seller" basis. The transfer was registered in accordance with law. The allegation it was not is baseless and without merit. Their purchase is valid; whatever arrangements there were between the plaintiffs and the other defendants do not affect the validity of their purchase.

The 6th defendant pleads furthermore the work they invested onto the said land, the expenditure (RM12,336,000) they expended, and that the balance of convenience is in their favour. The plaintiffs delayed in bringing the action. There was no cause of action and the claim is an abuse of the process of court. It is a shareholders' dispute; it is not connected to the 6th defendant.

Mr. Abu Bakar submitted, obviously addressing para. 26 of the statement of claim, that the 6th defendant was a *bona fide* purchaser. Referring to encl. 2 (an affidavit affirmed on 13 September 1995 in support of the plaintiffs' unsuccessful application for an interlocutory injunction) encl. 5 (the affidavit of Tan Kee Chin affirmed on 14 October 1995) and encl. 15 (the affidavit of the 5th defendant affirmed on 26 October 1995), he contended as follows. The plaintiffs agreed to sell 419,354 shares in the capital of the 1st defendant company, by an agreement dated 15 March 1991, to the 5th defendant. The plaintiffs transferred all their interests in the 1st defendant company prior to the sale of the subject land by the 1st defendant to the 6th defendant. The plaintiffs ceased to be directors of the 1st defendant company on 3 July 1991. Clause 2(iv) of the agreement 15 March 1991 provided for the plaintiffs' resignation as directors and the appointment of new directors of the 1st defendant company. The subject land, sold on 10 July 1991, was transferred to the 6th defendant on 15 July 1991. "It is obvious that the (6th defendant) had dealt with the right representatives (of the 1st defendant) and that the sale was a *bona fide* transaction." "The 6th defendant is not concerned with the internal problems bedeviling the sale of the shares." Lastly, Mr. Abu Bakar contended that paras. 26 and 27 of the statement of claim did not disclose a reasonable claim against the 6th defendant.

Miss Daphne Choy, for the plaintiffs, responded as follows. The plaintiffs were and still are the shareholders of the 1st defendant company; the 5th defendant admitted that he did not complete the purchase of the plaintiffs' shares. There was "basis", and learned counsel invited the court to peruse exh. TKC1 in encl. 5 (the 1st defendant's directors' resolution dated 10 July 1991) exh. SSH8 in encl. 2 (an agreement for the sale of the subject land between the 1st defendant and the 6th defendant), for the assertions in paras 26 and 27. There was a supplementary agreement for an under-counter payment of RM520,000 – exh. SSH2 of encl. 14 (the 1st defendant's letter of 12 June 1992 instructing Messrs Chong & Leonard, Advocates & Solicitors, to pay RM520,000, under a supplementary agreement dated 10 July 1991, to the 2nd defendant). She extended the authority of *Aik Ming (M) Sdn. Bhd. v. Chang Ching Chuen* [1995] 2 MLJ 770 for the court's consideration.

Mr. Abu Bakar informed that the striking out application was made under grounds (a - d). That might have been so. But, the application was argued solely on ground (a), since learned counsel for the 6th defendant failed and or declined altogether to argue the striking out of paras. 5, 26 and 27 under grounds (b - d). Even the examination of the material in the affidavits (encls. 2, 5 and 15) invited of the court was not to support a case under grounds (b - d), but to support a case that the 6th defendant was a *bona fide* purchaser and a case as such, in the words of Mr. Abu Bakar, "that paras. 26 and 27 of the statement of claim do not disclose a reasonable claim against the 6th defendant"; it should be said, though, that the affidavits supporting the application are totally devoid of any assertion that paras. 8, 26 & 27 of the statement of claim transgress r. (1)(b - d). However, that examination of the affidavits, with regard to the contention that the 6th defendant was a *bona fide* purchaser, surely to refute the existence of a reasonable claim, could not be pursued, as no affidavit evidence shall be admissible in an application under ground (a). Only the pleadings will be considered for the purpose of determining whether the statement of claim has disclosed a reasonable cause of action against the 6th defendant.

What is a reasonable cause of action? Mohd. Dzaiddin J, (as he then was), in *Penang Development Corporation v. Khaw Chin Boo & Anor* [1993] 2 MLJ 161, adopted the enunciation of Lord Pearson in *Drummond-Jackson v. British Medical Association & Ors* [1970] 1 WLR 688, "that a reasonable cause of action means a cause of action with some chance of success when (as required by para. (2) of the rule) only the allegations in the pleadings are considered" In *Sea Breeze Navigation Co. SA v. 'Hsing An' Owners* [1974] 1 MLJ 45, Chua J held it is not the function of the court, in an application under r. 19(1)(a), to try the issues but to decide simply whether there is a triable issue.

a And in *Tun Datuk Haji Mustapha bin Datuk Harun v. State Legislative Assembly of Sabah* [1993] 1 MLJ 26, it was held that a reasonable cause of action would be satisfied if a substantial issue has been raised for the court's determination and the plaintiff has some genuine interest in the remedy sought. "The mere fact that the case is weak and unlikely to succeed is no ground b for striking out the statement of claim" (*Mallal's Supreme Court Practice* (2nd edn.) para 18/19/2; see also the English Supreme Court Practice 1995 para. 18/19/11).

Also, a court will only exercise its powers to strike out pleadings, or part of a pleading (*Henry Wong Jan Fook v. John Lee & Anor* [1976] 1 MLJ 231) c under any of the four grounds in r. 19(1), in plain and obvious cases, a point repeatedly made by the courts and in *Bandar Builder Sdn. Bhd. & Ors. v. UMBC* [1993] 3 MLJ 36, where the Supreme Court restated, (i) that the principle upon which the courts act in exercising its power under any of the four limbs in r. 19(1) is only in plain and obvious cases that recourse should d be had to this summary process, (ii) that this summary process can only be adopted when it can clearly be seen that a claim or defence is on the face of it obviously unsustainable, and (iii) that that power to strike out cannot be exercised by a minute examination of the documents and the facts of the case in order to see whether a party has a cause of action or defence. On the e examination of documents and generally on applications to strike out actions, it is fitting to recall the judgment of Edgar Joseph Jr. SCJ in *Noor Jahan bte Abdul Wahab v. Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156 at 164:

> ... on an application to strike out the statement of claim or to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues f are in dispute (see *Wenlock v. Molone*). Also to be borne in mind is the principle that the court will not permit a plaintiff to be driven from the judgment seat 'except in cases where the cause of action was obviously bad and almost incontestably bad' (per Fletcher Moulton LJ in *Dyson v. A-G* at 419).

g The plaintiffs' case is that they, the majority shareholders of the 1st defendant company, were deceived into signing the said agreement of 15 March 1991; that agreement was a sham agreement to facilitate the sale of the said land to the 6th defendant. They plead the circumstances upon which their shares were pledged to the Sabah Development Bank and were then delivered, h without their knowledge and consent, to a firm of Advocates and Solicitors. They plead collusion and fraud in the disposal of the said land, the violation of the Companies Act 1965 and the National Land Code, and the wrongful disposal of RM4,980,000 to unauthorised parties. They allege the 6th defendant was not a *bona fide* purchaser; the 6th defendant knew or ought to have known

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(i) the sale of the said land was not with the approval of the shareholders of the 1st defendant, (ii) of the interest of the plaintiffs, and, (iii) the 2nd, 3rd and 4th defendants had no capacity nor power to dispose off the said land on behalf of the 1st defendant. They challenge the transfer of the said land in favour of the 6th defendant on grounds that the provisions of the National Land Code and the Companies Act were breached.

Those allegations are not unchallenged. Nevertheless, the plaintiffs have raised serious issues, and it is not clear nor obvious, when considering the pleadings alone, that the plaintiffs' action against the 6th defendant has no chance of success, as it may well be proved, in the trial, that the sale of the said land was indeed irregular and that the 6th defendant had knowledge of the fraud that is pleaded, as much as it may well be proved otherwise, in the same trial, that the sale was indeed regular and or that the 6th defendant had no knowledge whatsoever of any irregularity. The plaintiffs' action against the 6th defendant is not one that is clearly and obviously unsustainable. The disputed issues, *inter alia*, whether the 6th defendant was or was not a *bona fide* purchaser cannot be tried at this stage; it must await the trial.

Accordingly, the 6th defendant's application (encl. 10) is dismissed with costs.

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